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Supreme Court, U.S.
FILED
AUG 2 3 2002
OFFICE OF THE CLERK

No. 01 -1521

IN THE

Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON HBOC, INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRAN'S REPLY TO OPIC'S OPPOSITION

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Dated: August 23, 2002

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I. THE COURT SHOULD REVIEW THE COURT OF APPEALS' TREATY OF AMITY[1] RULING.

A. IF THIS COURT DENIES REVIEW, THE COURT OF APPEALS' RULING IS LIKELY TO REMAIN UNDISTURBED.

Both Iran and the United States agree that the court of appeals' ruling on this issue was wrong and that it would harm the foreign relations of the United States. Petition ("P") 9-14, OPIC Opp.9-14. Nevertheless, according to the Overseas Private Investment Corporation ("OPIC"), certiorari should not be granted, because, as a result of the court of appeals' remand order, the courts below will have an opportunity to consider the possible causes of action and the U.S. position as set out in its brief. If judgment is ultimately entered against Iran, "the Court can then decide whether to grant review to consider the existence of a cause of action under each of the various sources of law to the extent they remain in the case." Id. 15.

As we understand OPIC's position, this case is not like Titmus v. Tinsley, 370 U.S. 964 (1961), where the State Attorney General represented that the conceded error would be corrected in the proceedings in the court below. See Stern, et al., Supreme Court Practice (8th Ed. 2002), pp. 316-317. OPIC's brief makes no such representation. Just denying certiorari leaves the court of appeals' decision as the law of the case, the law of the D.C. Circuit, and persuasive precedent in every other circuit. There may be ways to bring this issue to the attention of the court of appeals before a trial bottomed on the premise that the Treaty provides the cause of action. All of these ways involve the exercise of discretion, however, and OPIC has made no representation that it will cooperate.

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[1] Treaty of Amity, Economic and Consular Relations between the United States of America and Iran, 8 U.S.T. 889 (1957).

The Solicitor General explains that OPIC was represented by the same counsel as McKesson in the court below, OPIC Brief 9 and n. 6, but does not explain why OPIC has been allowed to take a position contrary to the position of the United States on this important issue since May, 1996. Under the circumstances, we submit that OPIC cannot be relied upon to forcefully present its present views in the courts below if certiorari is denied. In any event, the court of appeals may not be disposed to change its views in light of the Solicitor General's brief. Iran made most of the same arguments in the court of appeals and the district court.

Also, as we show, the Solicitor General, who appeared only in this Court, may not fully recognize the danger to U.S. relations with foreign states presented by the many anti-foreign state rulings in this case.

B. THE ANTI-FOREIGN STATE RULINGS OF THE COURTS BELOW, IF ALLOWED TO STAND, WILL FUNNEL FSIA[2] CASES BASED UPON TREATIES INTO THE D. C. CIRCUIT WHERE THE RULINGS ARE THE LAW OF THE CIRCUIT.

Under the FSIA's commercial activity exception, 28 U.S.C. §1605(a)(2), the required contacts are with the United States as a whole, not a particular State. See P 2. For venue purposes, any civil action against a foreign state may be brought "in the United States District Court for the District of Columbia if the action is brought against a foreign state or a political subdivision thereof." 28 U.S.C. §1391(f)(4).

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[2] Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq.

The court of appeals' Treaty ruling provides two clear advantages for plaintiffs in cases alleging violations of Friendship, Commerce and Navigation ("FCN") Treaties. Not only did the court of appeals rule that the Treaty provided a private cause of action, but it also approved the district court's ruling that McKesson was excused from exhausting its remedies in the courts of Iran. PA 11a, 116a-123a and n. 25.

Several anti-foreign state rulings in this case make the D.C. Circuit the favored circuit on other issues.[3] However, focusing just on treaty cases, plaintiffs will be strongly

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[3] As we have shown, P 14-20, the D.C. Circuit here allowed jurisdiction over acts under the direct effect clause that other circuits would not permit. Other rulings in this case, some made by the district court and not addressed by the court of appeals, provide other reasons to bring FSIA cases here. The courts below did not require McKesson to prove its other jurisdictional elements, agency or commerciality, by a preponderance of the evidence. See P 7. The courts below did not require McKesson to show how Pak's supposed denial of dividends, that is, its refusal to establish a bank account in Tehran, etc., violated any legal obligation under Iranian law. See P 19-21. The courts below refused to give effect to many unopposed affidavits and legal opinions, although the implication of the failure to oppose was obvious. See P 24-25. The courts below refused to enforce against the U.S. plaintiffs the local rule requiring the filing of a statement of genuine issues. See P 22. The courts below refused to consider newly discovered evidence which obviously put in issue who cut-off the commercial contacts. See P 7 & n. 2.

Burnett et al. v. Al Baraka Corp. et. al., D.D.C. 02CV01616, a trillion dollar lawsuit arising out of the destruction of the World Trade Center and other aircraft hijackings on September 11, 2001, was filed on August 15, 2002. On a first review of this 259 page complaint, especially ¶¶1077-1095, it appears that the Kingdom of Saudi Arabia, although not a named defendant, is the ultimate deep pocket defendant because three of its chief ministers acting on behalf of the Kingdom are named defendants. The plaintiffs' lead attorney is admitted in South Carolina. The events in questions occurred mainly in New York. The case was nevertheless brought in the District of Columbia. 28 U.S.C. §1605(a)(2) is one of the alleged bases of jurisdiction. FSIA venue is based on 28 U.S.C. §1391(f)(4).

motivated to bring such cases in the District of Columbia. It may be years before the cases can be dismissed for lack of a cause of action given the D.C. Circuit's position in this case. The result will be an affront to many foreign states, who may retaliate, as OPIC acknowledges. Opp. 14.

C. ON THE TREATY ISSUE, THE COURT SHOULD SUMMARILY REVERSE OR HEAR THE CASE ON THE MERITS.

Disposition other than by denying certiorari might take one of three forms. The Court may be confident that further briefing is unnecessary on the issue, because, for, example, the Treaty is between Iran and the United States and they are in agreement as to its interpretation. If so, the Court should grant certiorari and summarily reverse and remand. If the Court is less certain, the Court might grant certiorari, vacate and remand to the court of appeals for further consideration in light of the new position taken by the United States. See, e.g., Lawrence v. Chater, 516 U.S. 163 (1996). However, as we have said, the court of appeals has already considered most of the arguments made in OPIC's brief. Finally, if the Court believes a substantial question is presented, the Court should grant certiorari and set the case for briefing and argument on the merits.

Iran's view is that all the arguments have now been made and the court of appeals, with respect, is clearly wrong, so summary reversal would be appropriate as an alternative to a grant of certiorari on the Treaty issue viewed in isolation. However, Iran believes that certiorari should also be granted on the jurisdictional and summary judgment issues, so Iran's ultimate position is that certiorari should be granted.

II. THE COURT SHOULD REVIEW THE COURT OF APPEALS' SUBJECT MATTER JURISDICTION RULING.

A. THE COURT OF APPEALS HAS MISINTERPRETED NELSON AND WELTOVER.

We have addressed these issues elsewhere, P 14-25, Reply to McK. Opp. 2-6, but address OPIC's particular arguments here. We agree with OPIC that in "determin[ing] whether the claim was 'based upon' the act giving rise to jurisdiction, the Court analyzed whether the jurisdictional acts were among the principal elements of the cause of action." Opp. 16. The acts, other than the denial of dividends, however, were not among these principal elements. As Iran has argued, the supposed denial of dividends was sufficient to support the claim for expropriation and without it all of the other asserted denials were insufficient. P 23-24.

OPIC never confronts this argument directly. See Opp. 16-18, and n. 12. We agree that the court of appeals refers to other acts, such as the supposed exclusion of McKesson and the supposed cut-off of contacts, but neither the court nor OPIC makes an attempt to demonstrate how these acts had any affect on the district court's expropriation finding. The denial of dividends quite clearly sufficed to support it. See PA 114a-116a, Iran's Reply to McK. Opp. 3-4, n. 2-5. Everything else was surplusage.

OPIC rejects Iran's argument that the focus in a Clause 3 case, where the statute refers to an action based on an "act," must be even narrower than in a Clause 1 case, see P 2, where the statute refers to an action based on an "activity," because 28 U.S.C. §1603(d) defines "commercial activity" to include,

among other things, "a particular commercial ... act." Opp. 17, n. 11. §1603(d), however, does not define "act" at all, much less define it to include "commercial activity." "Distinctions among descriptions juxtaposed against each other are naturally understood to be significant." Kingdom of Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993). Although we think the court of appeals' ruling would be incorrect even if made in a Clause 1 case, it was a fortiori wrong in a Clause 3 case, as here.

OPIC, like McKesson, does not confront Iran's argument that the supposed denial of dividends or even "cut-off" of contacts was not "direct" in the sense of "immediate," as Republic of Argentina v. Weltover, 504 U.S. 607, 618 (1992), requires. Opp. 17-18. Plainly, the denial of dividends, that is, Pak's refusal to set up a bank account in Tehran and deposit the dividends therein, had no "immediate" effect in the United States. See P 19-20.

Neither OPIC, McKesson, nor the court of appeals ever attempts to explain why Iran's supposed disruption of McKesson's investment in Iran which eventually "brought a halt" to the "constant flow of capital,"etc., see Opp. 18, constituted an "immediate" effect in the United States. According to OPIC, it is enough that the "the effects of [Iran's] disruption were plainly felt in the country." Id. Like McKesson, McK. Opp. 6, what OPIC is really arguing, we submit, is that the effect in the United States was "direct" only in the sense that it was "substantial" because McKesson, which is headquartered in the United States, ultimately felt the economic impact here.[4]

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[4] In a footnote, Opp. 18, n. 12, OPIC asserts that "the court of appeals opinion quite properly does not suggest that the FSIA's commercial activity exception offers a vehicle for challenging expropriations that are undertaken by sovereign acts rather than by commercial means." We

B. THE UNITED STATES HAS REVERSED POSITIONS ON THE WELTOVER ISSUE PRESENTED.

The United States, or at least the Solicitor General, has reversed positions since the filing of the amicus brief in Weltover. There the United States argued that requiring a court to ascertain the "effect" of a foreign state's act by examining the place where the "economic loss [is] suffered" would provide "an intractable standard for resolving the jurisdictional question." It was "far more sensible," according to the U.S. in Weltover, "to determine a foreign state's amenability to suit by a foreign creditor through a commercially relevant criterion that is fixed by the terms of the agreement or by governing law - the place where the debt is payable." U.S. Weltover Brief 9. This

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disagree. As a practical matter, that is exactly what the court of appeals has done. Iran argued in the district court and on its first appeal that this was an "expropriation" case, so jurisdiction had to be founded on 28 U.S.C. §1605(a)(3), which specifically provides jurisdiction over a case "in which rights in property taken in violation of international law are in issue and that property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." According to the House Report, "The term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law." H.R.Rep.No.94-1487 at 19-20. This case constitutes an end run around §1605(a)(3) in two ways. First, this is a case in which property taken in violation of international law is in issue, so §1605(a)(3), not the commercial activity exception, §1605(a)(2), applies. Second, the district court and the court of appeals ignored Iran's evidence that the supposedly commercial activities attributed to it should not have been attributed and that its actions had been sovereign. See Iran's Statement of Genuine Issues, JA 376-377. The United States concedes that "this is a claim for expropriation, not merely for the 'cut-off of commercial contacts' or for the 'non-payment of dividends.'" Opp. 16, emphasis added. Expropriation is generally considered an act of state, not a commercial act. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

is the standard Iran urges here. The debt in this case was the obligation to pay dividends, which were payable only in Iran.

C. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE JURISDICTIONAL QUESTIONS PRESENTED.

First, this case presents an issue which the lower courts frequently confront. The issue whether direct effect jurisdiction can be founded on the alleged non–payment of dividends where the dividends are payable only abroad is a typical example of the general issue whether direct effect jurisdiction can be based on a contractual duty to pay only abroad. Second, McKesson's efforts to avoid the impact of such a rule, attempting to obtain jurisdiction over an act which does not have a direct effect by connecting it to an act which does have a direct effect, is the sort of attempt that any competent corporate counsel will make if the court of appeals' decision is allowed to stand. Third, the unusual aspects of the case, its length and the involvement of the Iran-United States Claims Tribunal do not deprive the case of typicality. In the end, as we have shown, the only issue is whether the alleged non-payment of dividends had a direct effect in the United States. Contra, Opp. 18.

D. FURTHER DELAYING REVIEW DENIES IRAN ITS RIGHT TO SOVEREIGN IMMUNITY.

An additional consideration, which is peculiar to this suit, nevertheless cuts in favor of granting certiorari. Sovereign immunity involves immunity from suit, not just a defense to liability. PA 147a. This case was filed in 1982, and has been in active litigation in U.S. courts since 1988. It may be the

oldest FSIA case in active litigation.

The district court awarded McKesson some $3,000,000 in attorney's fees at the end of the trial on damages. Iran represented that it had spent some $1,000,000 on attorney's fees as of that time. Although the judgment has been set aside, an expenditure of $1,000,000 (and counting) to defend sovereign immunity is not consistent with immunity from suit.

The court of appeals' decision on this point is final since Iran's petition for rehearing and rehearing en banc on the Nelson and Weltover issues was denied. P 9. The court of appeals' opinion does not even note that Iran raised many genuine issues of material fact as to jurisdiction and forecloses pursuit of these issues in the district court. Surely, if Iran has raised substantial jurisdictional issues, it should not be forced through a second merits trial[5] and a fourth appeal to the D.C. Circuit before it can obtain review in this Court of the same issues that it presents here.

III. THE GRANT OF CERTIORARI SHOULD INCLUDE IRAN'S SUMMARY JUDGMENT ISSUES.

Iran's summary judgment issues, Question Presented 4, P i, might not merit review as a separate matter, see Opp.19, but we think (1) they are important in themselves, and (2) that the value of review may be lost if the issues are not included in a brief on the merits that addresses Questions Presented 2 and 3. As we have said, sophisticated U.S. plaintiffs are likely to use the same strategies employed by plaintiffs in this case to avoid the impact of Nelson and Weltover. Including Question 4 among the questions presented will permit the Court to

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[5] OPIC's suggestion that this trial, or that future proceedings in general, will be brief, Opp. 9, is not supported by the history of this case.

address these strategies in their practical context.[6]

CONCLUSION

For the foregoing additional reasons, Iran's petition for certiorari should be granted on all Questions Presented.

Respectfully submitted,

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[6] OPIC suggests that certain of the Cross-Petition's issues be accepted for review if Iran's issues are accepted, Opp. 24, because a change in the judgment might revive certain of these issues. Iran submits that it would be more efficient to address these problems in the remand order rather than granting certiorari on additional issues from the Cross-Petition. Iran's summary judgment issues are in a different category for the reasons given just above.